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No. 85-555

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

BANKERS TRUST COMPANY,

Petitioner,

v.

THELMA G. METGE, Executrix of the Estate of AUGUST METGE, and ELIZABETH G. SHEPARD, on behalf of themselves and on behalf of all others similarly situated,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

MOTION OF THE AMERICAN BANKERS ASSOCIATION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE AND BRIEF IN SUPPORT OF PETITION

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To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

The American Bankers Association respectfully moves, pursuant to Rule 36 of the Rules of this Court, for leave to file the attached brief as *amicus curiae*.

INTEREST OF THE AMERICAN BANKERS ASSOCIATION

The American Bankers Association is the largest national trade organization for the commercial banking industry in the United States. Its membership includes approximately 12,000 banks, or more than 82% of the industry. American Bankers Association member banks are located in each of the fifty states and the District of Co-

lumbia and include banks chartered by the United States and those chartered by their respective states.

This class action case involves reversal by the Eighth Circuit of a grant of summary judgment in favor of a commercial bank accused of aiding and abetting an alleged securities fraud by a borrower of the bank. A decision for the respondents here would expand the reach of the securities laws and their armamentarium of remedies by equating a lender's legitimate, business necessity-based knowledge of its borrower's sales activities with the scienter requirement for a finding of aider and abettor liability. Such a holding would so expand the investigatory and disclosure burdens on banks and other sources of commercial credit that their willingness to make such loans could be reduced, resulting in attenuated credit availability and higher rates to cover the higher attendant risks. Placing commercial banks at risk because of a heightened disclosure standard would in turn create liability for them in those states whose constitutions or statutes reinforce the inherent privacy of the relationship between a bank and its private borrowers. Beyond this enhanced lender liability, federalization of disclosure standards as a result of a holding for respondents here would do structural damage to state initiatives to protect and enhance privacy.

Counsel for the petitioner has consented to the filing of this brief under Rule 36, and a copy of that consent is filed herewith. Counsel for respondents has declined to consent.

WHEREFORE, it is respectfully requested that the Court grant leave to the American Bankers Association to file the attached Brief as *Amicus Curiae* in support of the petition for a writ of certiorari.

Respectfully submitted,

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QUESTION PRESENTED FOR REVIEW

Whether the court below correctly interpreted aider and abettor liability provisions of Section 10(b) of the Securities Exchange Act of 1934 to expand a bank's duty of disclosure of material information to its borrower's clients despite bank's positive duty not to disclose details of bank's private relationship with its borrower.

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF OF THE AMERICAN BANKERS ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF PETITION

INTEREST OF THE AMICUS CURIAE

The American Bankers Association respectfully submits this brief as *amicus curiae* to urge the Court to grant the petition for a writ of certiorari to review a decision of the United States Court of Appeals for the Eighth Circuit. In that decision the court reversed a grant of summary judgment for petitioners (Bankers Trust Company) by the District Court on the issue of aider and abettor liability for a violation of Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b) (1981) and of Securities and Exchange Commission Rule 10b-5, 17 C.F.R. § 240.10b-5 (1984).

As shown in the foregoing motion, a reversal of the summary judgment and any eventual finding of bank aider and abettor liability could have very significant negative impacts on any ABA member bank that makes loans

to an entity that markets its own shares or other investment vehicles. An interpretation extending the grounds for a finding of aider and abettor liability to the case where there is not only no demonstrable duty to the bank's borrower's securities clients but also a positive, state-based duty to preserve privacy could so increase ABA member banks' risks that lending to borrowers who raise capital by securities sales could be curtailed at worst and at least made more expensive. Such an extension of the grounds for liability would fundamentally alter the relation between a bank and its customers by forcing banks actively to police the securities offerings of its borrowers and to serve essentially as guarantors of their veracity, reliability, and profitability. Such a situation would represent a fundamental shift in the dynamics of lending by banks.

SUMMARY OF THE ARGUMENT

A finding of aider and abettor liability for violations of Section 10(b) of the Securities Exchange Act of 1934 may be based on satisfaction of three prerequisites. As developed in the Circuit from which this case comes to bar, there must be "a securities law violation by the primary party (as opposed to the aiding and abetting party); . . . 'knowledge' of the violation on the part of the aider and abettor; and . . . 'substantial assistance' by the aider and abettor in the achievement of the primary violation." *Stokes* v. *Lokken*, 644 F.2d 779, 782-83 (8th Cir. 1981). The second and third prerequisites, scienter and substantial assistance, vary inversely; where one is minimal, a greater showing of the other is required. *Woodward* v. *Metro Bank of Dallas*, 552 F.2d 84, 95 (5th Cir. 1975). The substantial assistance test may be met even by inaction if the inaction occurs in the face of a duty to act, *IIT, An International Investment Trust* v.

Cornfeld, 619 F.2d 909, 927 (2d Cir. 1980), especially if the claimed duty takes the form of some "special duty of disclosure." *Woodward*, 522 F.2d at 97.

These rules address two classes of cases, those where there is a duty to disclose material facts and those where the duty is absent. There is, however, a third, as yet unaddressed, category of cases that arises when a bank has a positive duty not to disclose the details of, and the information generated by, its relationships with its customers. The banking industry has a distinct interest in influencing the development of rules governing this third class of cases. Absent such rules, banks may find themselves subjected to irreconcilable obligations that on the one hand require them to make disclosures in order to avoid liability under Section 10(b) and on the other to observe a positive, state-based, unpreempted duty to preserve customer confidentiality. In such circumstances, banks would suffer liability no matter which of the two conflicting standards they ultimately choose to obey; they would certainly be without the ability to observe both.

Though the Court has clearly settled the rule that scienter is a requirement of a showing of securities fraud under Section 10(b) and Rule 10b-5, *Ernst & Ernst* v. *Hochfelder*, 425 U.S. 185 (1976), it has so far declined directly to address the correctness of the three-prong test for aider and abettor liability. This court specifically declined to do so in *Ernst & Ernst*, 425 U.S. at 191, n. 7.

For these reasons, we contend that the case at bar presents an important question of Federal law which has not been, but should be, settled by this Court under its Rule 17(c). We do not at this point suggest the outlines of what those rules might be. Should this Court grant a writ of certiorari, we would, with the Court's indulgence, address proposed rules for the third class of cases in a brief as *amicus curiae*. For the present, our discussion is

restricted to the limits of previous case law and Federal statutes and to the existence of state law-based duties for banks not to disclose the financial affairs of their customers.

ARGUMENT

Where A Bank Has A Positive Duty Not To Disclose Its Customer's Affairs, The Relationship Between The Second And Third Prongs Of The Aider-Abettor Liability Test Requires An Extraordinary Showing of Knowledge Of The Primary Securities Violation And Raises An Important Question Which Has Not Been, But Should Be, Settled By This Court.

A. *Basis of Aider and Abettor Liability*

The claim that a party is liable as an aider and abettor of securities fraud under Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b) (1981) and of Securities and Exchange Commission Rule 10b-5, 17 C.F.R. § 240.10b-5 (1984) rests on a three-pronged test, each part of which must be satisfied for liability to result. As developed by the process of judicial interpretation, the test requires that there be "a securities law violation by the primary party (as opposed to the aiding and abetting party); . . . 'knowledge' of the violation on the part of the aider and abettor; and . . . 'substantial assistance' by the aider and abettor in the achievement of the primary violation." *Stokes, supra*, p. 2.

The second and third prongs of the test, those setting out requirements for scienter or knowledge of the primary violation and for substantial assistance in commission of the violation, share an inverse relationship; where the degree shown of one is minimal, a greater showing of the other must be made. *Woodward, supra*, p.

3. The substantial assistance test may be met by a showing of positive action or of inaction if the inaction took place in the face of a duty to act. *IIT, supra* pp. 2-3. Inaction readily satisfies the substantial assistance test if the putative duty takes the form of some "special duty of disclosure" to one harmed in a securities transaction. *Woodward, supra* p. 3, at 97.

A showing of minimal knowledge may suffice if accompanied by a strong showing of substantial assistance. But if the equivalent of a negative degree of assistance could be shown by proof of a positive duty not to act, then a showing of an extraordinary degree of knowledge of the primary violation, one far beyond even that suggested by proof offered to support respondents' failed "controlling person" count (*Metge* v. *Baehler*, 762 F.2d 621, 630-632, (8th Cir. 1985)), should be required. It is even possible that a showing of a positive duty not to disclose may not logically be overcome by even a strong showing of scienter and may raise a presumption that scienter is absent.

B. *Limits of Rules Denying Bank Customer Privacy*

It is well settled that an accused in a Federal prosecution has no Fourth Amendment right to protection of his papers and effects against unreasonable searches and seizures that can be vindicated by resistance to a subpoena *duces tecum* seeking production of the checks, deposit slips, and other records relating to his bank accounts. *U.S.* v. *Miller*, 425 U.S. 435 (1976). An accused in a Federal prosecution likewise has no Fourth Amendment-based expectation of privacy related to such materials when sought by appropriate process. *Id.*

Nor is there relief for such an accused in Federal statute. The Right to Financial Privacy Act of 1978, 12 U.S.C. §§3401 – 3422 (1980), was clearly a response to

the perceived sweep of *Miller*. Financial Institutions Regulatory and Interest Rate Control Act of 1978, H. Rep. No. 1383, 95th Cong., 2d Sess. 34, *reprinted* in 1978 U.S. CODE CONG. & AD. NEWS 9273, 9306. The Act bars Federal government access to the financial records of any customer of a financial institution unless the records are reasonably described and the customer authorizes the disclosure or the records are disclosed pursuant to an administrative subpoena or summons, a search warrant, a judicial subpoena or a formal written request of a Federal government authority. 12 U.S.C. § 3402. Thus, while on the one hand creating strict limits to government access to a bank customer's records and a method for resisting access, the Act also condones and regulates the process by which a customer's records may be accessed.

Federal preemption of state law also affects any assessment of bank customer record privacy. Preemption generally arises if "Federal legislation has left the State with no duties or responsibilities" in a field and occupied the entire field of concern. *Warren Trading Post Co.* v. *Arizona Tax Comm'n*, 380 U.S. 685, 691 (1965). Preemption also occurs where there is a clear collision between state and Federal law. *Hamm* v. *Rock Hill*, 379 U.S. 306, 311 (1964). Any state legislation that frustrates the full effectiveness of Federal law is rendered invalid by the Supremacy Clause. *Perez* v. *Campbell*, 402 U.S. 637, 652 (1971). But a state law is not preempted merely because it has a purpose identical with that of a Federal law; to be invalid, the state law would have to frustrate the purpose of the Federal statute to some extent. *Colorado Anti-Discrimination Comm'n* v. *Continental Air Lines*, 372 U.S. 714, 722 (1963).

Given the clear limit of the coverage of the Right to Financial Privacy Act to customer record access by the Federal government, it may not fairly be said that preem-

ption occurs as a result of a Congressional intent to occupy the whole field of access to bank customer records. 12 U.S.C. §§ 3401-3403. An example of a conflict between operation of the Act and a state provision occurred where a grand jury investigation was impeded by a claim of applicability of a Connecticut statute governing service of process and providing for notice to the customer and an opportunity to challenge access (Conn. Gen. Stat. §§ 36-9j – 36-9o (1981)). The court held the Federal statute controlling and upheld the grand jury's subpoena. *In re Grand Jury Subpoena (Conn. Sav. Bank)*, 481 F.Supp. 833, 834 (D. Conn. 1979).

An additional issue is whether Federal law preempts or supplants state law on point. Federal securities statutes explicitly recognize concurrent jurisdiction of the states in regulating securities. *North Star Intern.* v. *Arizona Corp. Comm'n*, 720 F.2d 578, 582 (9th Cir. 1983), *citing* 15 U.S.C. 77r (1981) (upholding merit review of securities sale when no conflict with Federal law is found). Similarly, a Federal court has upheld state securities registration provisions in the face of preemption claims where there is no conflict and by virtue of Federal statutory recognition of the right of states to legislate in the securities field. *Underhill Associates, Inc.*, v. *Bradshaw*, 674 F.2d 293, 195-96 (4th Cir. 1982), *citing* 15 U.S.C. 78a *et seq.* Federal courts are clearly practicing a jurisprudence that allows for operation of nonconflicting state securities statutes. Given this room for state law to operate in the field of securities regulation, situations such as the one at bar leave banks potentially caught between the rock of a Federal claim against them based on nondisclosure and the hard place of state law requiring protection of bank customer record confidentiality.

The string that runs through *Miller*, the Act, and its preemptive capacity is that they reach only a portion of

the issues surrounding the confidentiality of bank records. How broad is *Miller's* reach? It affects the records of every accused Federal defendant but goes no further. How far does the Right to Financial Privacy Act go? It goes only far enough to regulate Federal access to records and resistance to that access. How many bank-related confidentiality concerns are preempted by Federal law? Only those attempting to occupy or affect the narrow field of regulation of Federal investigatory activities or those interpreted to conflict with Federal investigations are preempted. Thus, the string running through these Federal resolutions of bank privacy issues is also a strong rope binding them tightly within only a portion of the broader category of bank privacy and confidentiality concerns.

If the requested access is not from a Federal entity, federal law does not control. If the issue is not duplicative of Federal law or an impediment to a Federal investigation, Federal law does not control. And if a right to privacy is asserted independently of the reach of Federal action or of state application of the Fourth Amendment through the Fourteenth Amendment, Federal law does not control.

C. *Duty Not To Disclose*

What, then, is left? Once the limits of Federal law on bank record confidentiality are reached, how much, if any, of the field is left unaffected and unpreempted? The answer is illustrated by the case at bar and by substantive rights to privacy rooted in state constitutions and statutes.

The constitutions of several states go beyond the Federal Constitution and explicitly create a right to personal privacy. These privacy rights are separate and distinct

from state-based rights comparable to those protected by the Fourth Amendment. The Alaska Constitution declares, "The right of the people to privacy is recognized and shall not be infringed." Alaska Const. art. I, § 22. Arizona and Washington provide that "No person shall be disturbed in his private affairs, or his home invaded, without authority of law." Ariz. Const. art. 2, § 8; Wash. Const. art. I, § 7. California includes "pursuing safety, happiness, and privacy" among the inalienable rights of her people (Cal. Const. art. I, § 1), and Hawaii declares that "The right of the people to privacy is recognized and shall not be infringed without the showing of a compelling state interest." Hawaii Const. art. I, § 6. Illinois, Louisiana, and South Carolina assign protection against "invasions of privacy" equal status with protection against unreasonable searches and seizures. Ill. Const. art. 1, § 6; La. Const. art. 1, §5; S.C. Const. art. I, §10.

These constitutional protections exist separately from, or coequally with, the class of rights protected by the Fourth Amendment and its state analogues. As such, they demonstrate the existence of bases for finding free-standing, unpreempted rights to bank confidentiality unaffected by the prior decisions of this Court or by any decision based on a reading of the observably limited reach of the Fourth Amendment. When combined with the restrictions imposed by the state action requirement of the Fourteenth Amendment, private transactions that include inquiries about the details of a bank's relations with its customers stand apart from those official—Federal, state, or local investigative—inquiries permitted to lift the mantle of confidentiality that inheres in the relationship.

A number of states have statutes in place that perform much the same function as the Federal Right to Financial Privacy Act; that is, they regulate the means by which

access is permitted by official inquirers. *E.g.*, Alaska Stat. § 06.05.175 (1984); Okla. Stat. Ann. tit. 6, §§ 2201 – 2205 (West 1984); Utah Code Ann. §§ 78-27-45 – 78-27-50 (1977). Other state statutes regulate similar official access and also permit some narrowly defined categories of private access. These include access for the purpose of performing independent audits by a certified public accountant or as a part of an exchange of credit information (*e.g.*, Ill. Ann. Stat. ch. 17, ¶ 360 (Smith-Hurd Supp. 1985), Md. Fin. Inst. Code Ann. §§ 1-301 – 1-305 (Supp. 1985)), exchanges of information relating to dishonor of a negotiable instrument (*e.g.*, Conn. Gen. Stat. §§ 36-9j – 36-9o (1981)), and other particularly described exemptions (*e.g.*, exchanges of mortgage account information in the regular course of business, Md. Fin. Inst. Code Ann. § 1-303 (Supp. 1985)).

What the state statutes, many of them passed in the same year or soon after *Miller* (*e.g.*, Cal. Gov't Code §§ 7460 – 7480 (Deering 1982); Conn. Gen. Stat. §§ 36-9j – 36-9o (1981); La. Rev. Stat. Ann. § 9:3571 (West 1983); Neb. Rev. Stat. §§ 8-1401, 8-1402 (1983); N.H. Rev. Stat. Ann. §§ 359-C:1 – 359-C:6 (1984)), have in common is a determination to permit specified classes of official and, in some cases, private inquirers to access bank customer financial records only under controlled circumstances. By clearly outlining these circumstances, the statutes unmistakably divide specifically permitted access from the general rule of confidentiality. They also divide the use of information that may be taken from bank records from the general rule of nonuse of this information. These emphatic divisions serve to delineate, in the clearest possible manner, the limits of the reach of *Miller* and of permitted Federal and State inquiries under color of the Fourth Amendment. By drawing these limits, they also serve to point up the existence of wholly unaffected

rights to confidentiality in the relations between banks and their customers.

The significance of this undiluted preserve of customer confidentiality is that its existence places banks under clear duties not to disclose information about their customers' finances without specific authority to do so. It would thus be impossible for a bank to bandy about the details of its loans to a customer involved in sales of securities without risking liability under these constitutions and statutes. Yet application of Section 10(b) and Rule 10b-5 as suggested in the case at bar would impose liability on banks even as they attempted to avoid liability under color of state law.

The situation is as we have earlier described it: There are rules for the case where there is a duty to disclose and rules for the case where there is no duty. What prevents existence of a complete, principled jurisprudence on point is the lack of rules governing the third case, the case where a bank confronts a positive, free-standing, unpreempted duty not to disclose its customer's finances. Once these rules are elucidated, their effect on the showing required of a plaintiff can be determined. If there is a showing of a positive duty not to disclose, is there any degree of scienter that could be shown that would overcome that duty? Or would a showing of such a duty constitute a new presumption that could only be overborne by additional evidence?

These points raise an important issue of Federal securities law as yet undecided by this Court. They reveal a conflict among the reach of settled Federal case law and a variety of state constitutional and statutory requirements. And they indicate an area of Federal law not yet definitively addressed.

CONCLUSION

For all of the reasons stated herein, the *amicus* American Bankers Association, on behalf of its approximately 12,000 member banks, respectfully urges this Court to grant the petition for a writ of certiorari.

Respectfully submitted,

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